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16
17 Attorneys for Defendant
18 FIDELITONE LAST MILE, INC.

19
20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA

22
23 AMERICA CABALLERO, an
24 individual; Individually and on Behalf
25 of All Similarly Situated Individuals,

26 Plaintiff,

27 vs.

28 FIDELITONE LAST MILE, INC., a
29 Delaware corporation; and DOES 1
30 through 20, Inclusive,

31 Defendant.

32 Case No. 4:20-cv-6281

33 **CLASS ACTION**

34
35 **DEFENDANT FIDELITONE LAST
36 MILE, INC.'S NOTICE OF
37 REMOVAL OF CIVIL ACTION
38 UNDER 28 U.S.C. §§ 1332(d) AND 28
39 U.S.C. § 1441(b)**

40 [Filed concurrently with Declaration of
41 Sarah Bradley, Notice of Related Cases,
42 Notice of Interested Parties, and Civil
43 Cover Sheet]

44
45 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO PLAINTIFF
46 AMERICA CABALLERO AND HER ATTORNEYS OF RECORD:

47
48 PLEASE TAKE NOTICE that Defendant Fidelitone Last Mile, Inc.
49 ("Defendant") files this Notice of Removal. The above-entitled case is a civil action
50 over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332(a) and

1 is one that may be properly removed to this Court pursuant to 28 U.S.C. § 1441(b).
2 In compliance with 28 U.S.C. § 1446(a), Defendants assert the following grounds
3 for removal:

4 1. On or about July 31, 2020, Plaintiff America Caballero (“Plaintiff”)
5 commenced the aforementioned action against Defendant by filing a Class Action
6 Complaint in the Superior Court of the State of California, County of Alameda,
7 entitled *America Caballero, an individual; individually and on behalf of all*
8 *similarly situated individuals v. Fidelitone Last Mile, Inc.*, Case No. RG20069582
9 (hereinafter the “State Court Action”).

10 2. True and correct copies of Plaintiff’s Summons and Complaint, along
11 with the papers that accompanied the Complaint, are attached to this Notice as
12 Exhibit A.

13 3. Defendant was served with the Summons and Complaint on August 6,
14 2020.

15 4. On September 2, 2020, Defendant filed in the State Court its Answer to
16 the Complaint, as required by the California Code of Civil Procedure. A true and
17 correct copy of the Answer is attached hereto as Exhibit B and is incorporated
18 herein by this reference as if set forth in full.

19 5. On September 3, 2020, Defendant filed in the State Court an Amended
20 Answer to the Complaint. A true and correct copy of the Amended Answer is
21 attached hereto as Exhibit C and is incorporated herein by this reference as if set
22 forth in full.

23 6. Defendant has not filed, served or received any papers or pleadings in
24 the State Court Action other than those attached hereto as Exhibits A, B and C.

25 7. This Notice is timely filed in that it is filed within 30 days of service of
26 the Summons and Complaint on Defendant. *See* 28 U.S.C. § 1446(b); and Fed. R.
27 Civ. Proc. 6.

28

1 8. Defendant will serve written notice of the filing of this Notice of
2 Removal to Plaintiff, as required by 28 U.S.C. § 1446(d), and will file a Notice of
3 Removal with the clerk of the Superior Court of the State of California in and for the
4 County of Alameda, as further required by that statute.

Removal Based on Diversity of Citizenship

6 9. The Court has original diversity jurisdiction over this action pursuant to
7 28 U.S.C. § 1332(a)(1), and it may be removed to this Court pursuant to 28 U.S.C. §
8 1441(b). Specifically, and as explained more fully below, this action involves
9 citizens of different states. As also explained more fully below, the amount in
10 controversy in this action exceeds the sum of \$75,000.

11 10. “[F]ederal subject matter jurisdiction over a class action may be
12 premised on either the conventional diversity rules (including utilization of
13 supplemental jurisdiction) or on [the Class Action Fairness Act] (CAFA).” *See Biag*
14 *v. King George – J&J Worlwide Servs. LLC*, 2020 U.S. Dist. LEXIS 129528, *22-
15 23 (S.D. Cal. July 22, 2020) (“Because CAFA explicitly expands diversity
16 jurisdiction rather than diminishes its scope, failure to meet CAFA requirements
17 does not preclude the possibility of meeting traditional diversity jurisdiction
18 requirements under § 1332(a).”). *See also* C. Wright & A. Miller, Fed. Pract. &
19 Proc. Juris § 3728 (Rev. 4th ed. 2020) (“Insofar as CAFA creates original
20 jurisdiction over cases that previously were beyond federal diversity subject-matter
21 jurisdiction, CAFA enlarges the universe of cases that may be removed pursuant to
22 28 USC § 1441”).

23 11. At the time this lawsuit was filed, Plaintiff America Caballero was, and
24 still is, a citizen of the State of California. (Exh. A, Cmplt., ¶ 7.)

25 12. At the time this lawsuit was filed, Defendant was, and still is,
26 incorporated in the State of Delaware and maintained its corporate headquarters and
27 principal place of business in the State of Illinois. *See* Declaration of Sarah Bradley
28 (“Bradley Decl.”), ¶ 4, attached hereto as Exhibit D.

1 13. Pursuant to 28 U.S.C. § 1441(b), the residence of fictitious and
2 unknown defendants should be disregarded for purposes of establishing removal
3 jurisdiction under 28 U.S.C. § 1332. *Fristoe v. Reynolds Metals Co.*, 615 F.2d
4 1209, 1213 (9th Cir. 1980). Thus, the possible existence of unnamed Doe
5 Defendants, 1 through 25, inclusive, as alleged in Plaintiff's Complaint, does not
6 deprive this Court of jurisdiction.

7 14. In light of the foregoing, Plaintiff is a “citizen of a State different from”
8 Defendant under 28 U.S.C. § 1332(a); *Hertz Corp. v. Friend*, 130 S. Ct. 1181
9 (2010).

Amount in Controversy

11 15. Removal jurisdiction exists where original jurisdiction also would have
12 existed, and the removing defendant bears the burden of establishing jurisdiction.
13 28 U.S.C. § 1441(a); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). If a
14 complaint on its face alleges that the amount in controversy exceeds the minimum
15 required to invoke diversity jurisdiction (\$75,000), and all of the other requirements
16 for diversity jurisdiction are met, the action is removable. 28 U.S.C. § 1332. The
17 court may, for removal purposes, look to the removal papers for underlying facts
18 establishing the jurisdictional limit. *Gaus*, 980 F.2d at 566. A defendant seeking to
19 remove a case to a federal court must file a notice of removal containing only a short
20 and plain statement of the grounds for removal, consistent with the general pleading
21 requirement stated in Rule 8(a) of the Federal Rules of Civil Procedure, and such
22 removal allegations must be construed liberally. *Dart Cherokee Basin Operating*
23 *Co., LLC v. Owens*, 135 S. Ct. 547, 553 (2014). A removing defendant need not
24 submit admissible evidence of the amount in controversy with its notice of removal;
25 rather, the defendant need only plausibly allege that the amount in controversy
26 exceeds \$75,000. *Id.* at 554.

27 16. A defendant in a diversity action can satisfy the amount in controversy
28 for removal purposes by establishing that there is a reasonable probability that at

1 least one named plaintiff has more than \$75,000 in controversy. *Exxon Mobil Corp.*
 2 *v. Allapattah Servs.*, 545 U.S. 546, 549 (2005); *Calderon v. BKB Construction, LP.*,
 3 2017 WL 2618094, *2 (N.D. Cal 2017); *Aguilar v. Zep. Inc.*, 2013 WL 12173914
 4 *fn 5 (N.D. Cal 2013).

5 17. The amount in controversy in this case exceeds \$75,000, excluding
 6 interest and costs. In her Complaint, Plaintiff alleges that she was misclassified as
 7 an independent contractor for Defendant. (Exh. A, Cmplt., ¶ 15.) Plaintiff asserts
 8 the she, and other purportedly similarly situated Delivery Drivers, were employees
 9 of Defendant, and on that theory, Plaintiff asserts the following violations of wage
 10 and hour provisions of the California Labor Code and/or Industrial Welfare
 11 Commission Wage Order: (1) failure to pay minimum wage; (2) failure to pay
 12 overtime compensation; (3) failure to reimburse employment expenses; (4) unlawful
 13 deductions from wages; (5) failure to provide meal periods; (6) failure to authorize
 14 or permit rest periods; (7) failure to provide accurate wage statements; and (8)
 15 waiting time penalties. (Exh. A, Cmplt., ¶¶ 40-89.) Plaintiff further alleges that the
 16 foregoing violations amount to a violation of the California Unfair Competition
 17 Law, Business and Professions Code sections 17200, *et seq.* (Exh. A, Cmplt., ¶¶ 90-
 18 102.) As alleged in the Complaint, Plaintiff seeks to recover from Defendant, for
 19 herself and other putative class members, unspecified amounts of unpaid wages and
 20 other monetary relief (inclusive of interest), compensatory damages, restitution,
 21 disgorgement of profits of Defendant, various statutory penalties, punitive damages,
 22 and attorneys' fees and costs. (Exh. A, Cmplt., p. 22 "Prayer for Relief").

23 18. Defendant denies that Plaintiff is entitled to any recovery in this action,
 24 and by filing this Notice of Removal, Defendant does not waive any defenses that
 25 otherwise may be available to it. Without waiving this position, and in light of the
 26 allegations of Plaintiff's Complaint, the amount in dispute as to Plaintiff's claims
 27 alone exceed \$75,000 exclusive of interest and costs.

28

1 19. Between July 16, 2018 and April 14, 2020, Plaintiff provided driving
 2 and delivery services to her employer, Caballero Delivery Service, who in turn,
 3 contracted with Defendant to provide independent contractor driver and delivery
 4 services to Defendant. (Bradley Decl., ¶ 4.) Plaintiff, through her employer
 5 Caballero Delivery Service, provided services to Defendant by driving delivery
 6 truck routes approximately 271 times over the course of 253 days during the above-
 7 mentioned time period. (Bradley Decl., ¶ 5.) Plaintiff provided services to
 8 Defendant pursuant to a contract between Defendant and Plaintiff's employer,
 9 Caballero Delivery Service. (Bradley Decl., ¶ 4.) During the period of time Plaintiff
 10 drove a delivery truck route as an employee of Caballero Delivery Service, between
 11 July 16, 2018, and April 14, 2020, Defendant paid Caballero Delivery Service
 12 approximately \$169,024.50. *Id.*

13 20. The records maintained by Defendant in the ordinary course of
 14 business, demonstrate that the time Plaintiff spent driving delivery truck routes for
 15 her employer, Caballero Delivery, varied. (Bradley Decl., ¶ 6.) However, on the
 16 days Plaintiff provided delivery services to Defendant, Defendant estimates that
 17 Plaintiff spent an average of approximately seven to eight hours per day doing so.
 18 *Id.*

19 21. As an exemplar, a review of records maintained by Defendant for the
 20 month of February 2020 shows that Plaintiff spent an average of approximately 7.2
 21 hours on delivery routes, including time for preparation and return. (Bradley Decl.,
 22 ¶ 7.) The records further show that during this same time period, Plaintiff typically
 23 started her delivery route each day between 8:00 a.m. and 10:00 a.m., and ended her
 24 route between 4:00 p.m. and 7:00 p.m. *Id.*

25 22. Plaintiff alleges in her Complaint that Defendant failed to provide her
 26 with rest periods as required by California law. If Plaintiff establishes that she was
 27 an employee of Defendant and prevails on this claim, she would be entitled to one
 28 hour of premium pay for each day she was not provided with a rest period. Plaintiff

1 alleges that she was treated as an independent contractor and that she regularly
 2 worked in excess of four hours without receiving a rest break. (Exh. A, Cmplt. ¶¶
 3 77-79). Based on the estimate that Plaintiff worked approximately 253 days, and
 4 based on a conservative estimate that Plaintiff was not provided a rest break by
 5 Defendant at least once each day, Plaintiff would be entitled to 253 hours of
 6 premium pay.

7 23. Plaintiff also alleges in her Complaint that she was not provided meal
 8 periods as required by California law. If Plaintiff establishes that she was employed
 9 by Defendant and prevails on this claim, Plaintiff would be entitled to one hour of
 10 premium pay for each day she was not provided a meal break. Plaintiff claims that
 11 she was treated as an independent contractor and that she regularly worked in excess
 12 of five hours without receiving a meal break. (Exh. A, Cmplt. ¶¶ 71-73). Based on
 13 the estimate that Plaintiff worked approximately 253 days, and based on a
 14 conservative estimate that Plaintiff was not provided a meal break by Defendant one
 15 half of the total time she worked, Plaintiff would be entitled to approximately 137
 16 hours of premium pay.

17 24. Plaintiff also asserts in her Complaint that she incurred expenses for
 18 which she was not reimbursed by Defendant, including the purchase and/or lease
 19 and depreciation of vehicles, fuel, maintenance, insurance, uniforms and certain
 20 tools and equipment. (Exh. A, Cmplt. ¶ 55.) Given that Plaintiff was an independent
 21 contractor and provided her own delivery truck, paid for her own insurance, gas, and
 22 uniforms, Defendant is informed and believes that amounts Plaintiff would be
 23 entitled to recover on this claim alone would be over \$75,000. *Id.*

24 25. Plaintiff also claims in her Complaint that Defendant failed to pay her
 25 minimum wage including for time spent attending mandatory meetings, waiting to
 26 receive merchandise at Defendant's stores and warehouses, work time spent picking
 27 up and transporting haul away merchandise and time spent returning paperwork to
 28 Defendant's clients stores at the end of the workday. (Exh. A, Cmplt. ¶ 42). Based

1 on the estimate that Plaintiff worked approximately 253 days, and based solely on
 2 the allegation that she was not paid for her time spent to return paperwork at the end
 3 of the workday, Plaintiff would be entitled to liquidated damages equal to the
 4 amount of lost wages for that minimum one hour of time that she was not paid
 5 returning the paperwork at the end of each day. During the period of time that
 6 Plaintiff performed services for Defendant, the average minimum wage rate under
 7 California law was \$12 per hour.

8 26. Plaintiff claims in her Complaint that she was not paid overtime (i.e.,
 9 1.5 times her purported regular rate of pay) for hours worked in excess of eight
 10 hours in a day or 40 hours in a week. (Exh. A, Cmplt. ¶¶ 48-50.) Therefore,
 11 assuming conservatively that Plaintiff worked one hour of “overtime” on one third
 12 (1/3) of the total days that she worked, Plaintiff would be entitled to 85 hours of
 13 overtime pay. Cal. Lab. Code § 510; Cal. Bus. & Prof. Code § 17206.

14 27. Plaintiff also asserts in her Complaint a claim for “waiting time”
 15 penalties because she alleges that she did not receive all wages due and owing upon
 16 the separation of her purported employment. (Exh. A, Cmplt. ¶¶ 84-89.) This
 17 penalty equals thirty (30) days of wages based on a full-time schedule. Cal. Lab.
 18 Code § 203(a).

19 28. If Plaintiff prevails on her claim in the Complaint that Defendant was
 20 obliged but failed to provide her with accurate wage statements (Exh. A, Cmplt. ¶¶
 21 81-82), she would be entitled to a \$4,000 penalty for that alleged violation. (Cal.
 22 Lab. Code § 226(c).)

23 29. Moreover, in determining the amount in controversy, the Court must
 24 consider the aggregate of general damages, special damages, punitive damages, and
 25 attorneys' fees. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir.
 26 1998) (holding that claims for statutory attorneys' fees to be included in amount in
 27 controversy, regardless of whether such an award is discretionary or mandatory);
 28 *Davenport v. Mut. Benefit Health & Accident Ass 'n*, 325 F.2d 785, 787 (9th Cir.

1 1963) (holding that punitive damages must be taken into account where recoverable
 2 under state law); *Conrad Assoc. 's v. Hartford Accident & Ind Co.*, 994 F. Supp.
 3 1196, 1198 (N.D. Cal. 1998) (holding that the "amount in controversy" includes
 4 claims for general and special damages); *Brady v. Mercedes-Benz USA, Inc.*, 243 F.
 5 Supp. 2d 1004, 1010-11 (N.D. Cal. 2002) ("Where the law entitles the prevailing
 6 plaintiff to recover reasonable attorney fees, a reasonably estimate of fees likely to
 7 be incurred to resolution is part of the benefit permissibly sought by the plaintiff and
 8 thus contributes to the amount in controversy."). Here, Plaintiff seeks interest,
 9 punitive damages, cost of suit, and attorney fees. Plaintiff's claim for attorneys'
 10 fees and costs alone is likely to exceed \$75,000 (e.g., California Labor Code Section
 11 226 allows for an award of reasonable attorneys' fees).

12 30. When assessing attorneys' fees for the purpose of determining the
 13 amount in controversy, a court should consider "the amount that can reasonably
 14 be anticipated at the time of removal, not merely those already incurred."
 15 *Simmons v. PCR Technology*, 209 F. Supp. 2d 1029, 1031 (N.D. Cal. 2002).

16 31. Additionally, "[i]f the complaint does not clearly specify damages, the
 17 court may examine facts in the complaint and evidence submitted by the parties."
 18 *Simmons*, 209 F. Supp. 2d at 1031. In addition to the evidence regarding the present
 19 value of Plaintiff's claim for wage and hour violations, as described in paragraphs
 20 19-29 above, the Court may consider "jury verdicts in similar cases," so long as
 21 such cases are "factually identical or, at a minimum, analogous to the case at issue."
 22 *Mireles v. Wells Fargo Bank, N.A.*, 845 F. Supp. 2d 1034, 1055 (C.D. Cal. 2012).

23 32. In *Gonzalez v. A'la Carte Catering, Inc.*, 2016 WL 1554819 (Cal.
 24 Super. 2016), plaintiff was reportedly employed as a mechanic and alleged that he
 25 was misclassified as an independent contractor. Plaintiff's claims for
 26 misclassification, failure to pay overtime and failure to furnish itemized wage
 27 statements proceeded to trial. The jury found that the plaintiff was owed \$127,750
 28

1 for overtime wages owed and \$4,000 for failure to provide itemized wage statement
 2 for a total award of \$131,750.

3 33. In *Cabardo, et al. v. Patacsil*, 2020 WL 3865034 (E.D. Cal. 2020), six
 4 plaintiffs alleged that they were misclassified as exempt employees and that the
 5 defendant failed to pay them minimum wage and overtime, failed to provide meal
 6 and rest breaks and failed to provide itemized wage statements. The jury found for
 7 the plaintiffs and specifically found that one plaintiff was entitled to \$116,342 and
 8 another plaintiff was entitled to \$261,087. The jury separately awarded PAGA
 9 penalties.

10 34. Punitive damages as sought by Plaintiff (to which Defendant asserts
 11 she is not entitled) certainly may meet or exceed the amount of damages Plaintiff
 12 could recover for wage and hour violations.

13 35. Defendant has carried its burden of demonstrating by a preponderance
 14 of the evidence that the amount in controversy in this matter exceeds the
 15 jurisdictional minimum of \$75,000.

16 36. While Defendant has produced solid evidence in support of its Notice
 17 of Removal, it is noteworthy that in *Dart Cherokee Basin Operating, LLC v. Owens*,
 18 135 S. Ct. 547 (2014), the Supreme Court held that a defendant's notice of removal
 19 of a case from state to federal court need include only a plausible allegation that the
 20 amount in controversy exceeds the jurisdictional threshold; it does not need to
 21 contain evidentiary submissions.

22 37. For the foregoing reasons, this action is a civil action over which this
 23 Court has original jurisdiction pursuant to 28 U.S.C. § 1332, and which may be
 24 removed by Defendant to this Court pursuant to 28 U.S.C. § 1441(a), in that the
 25 amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs,
 26 and is between citizens of different states.

27
 28

Venue

38. Venue lies in the United States District Court for the Northern District of California, pursuant to 28 U.S.C. sections 84(d) and 1441(a) because this Court's territorial jurisdiction includes Alameda County, California, where the State Court Action was filed and is pending.

39. For all of the foregoing reasons, Defendant respectfully submits that the State Court Action is removable to this Court under 28 U.S.C. §§ 1332(a) and 1441(b).

Dated: September 4, 2020

NIXON PEABODY LLP

By: /s/ Erin Holyoke

Seth L. Neulight
Erin Holyoke
Attorneys for Defendant
FIDELITONE LAST MILE, INC.